UNITED STATES PATENT AND TRADEMARK OFFICE

mn

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/909,711	07/19/2001	Eric Sven-Johan Swildens	SPEE0005	2091

22862   7590   05/31/2007
GLENN PATENT GROUP
3475 EDISON WAY, SUITE L
MENLO PARK, CA 94025

EXAMINER
JEAN, FRANTZ B

ART UNIT	PAPER NUMBER
2151	

MAIL DATE	DELIVERY MODE
05/31/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE <u>3</u> MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *16 May 2007*.

2a)☒ This action is **FINAL**.   2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-5,7-26 and 28-62* is/are pending in the application.

    4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-5,7-9,11-19,21-26,28-30,32-40,42-50,52-60,62* is/are rejected.

7)☒ Claim(s) *10,20,31,41,51 and 61* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

    a)☐ All   b)☐ Some * c)☐ None of:

      1.☐ Certified copies of the priority documents have been received.

      2.☐ Certified copies of the priority documents have been received in Application No. _____.

      3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1)☐ Notice of References Cited (PTO-892)

2)☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3)☐ Information Disclosure Statement(s) (PTO/SB/08)
    Paper No(s)/Mail Date _____.

4)☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____.

5)☐ Notice of Informal Patent Application

6)☐ Other: _____.

This office action is in response to applicants' response filed on 05/16/07. Claims 1-5, 7-

26, and 28-62 are pending in the application.

Priority to provisional US Patent Application Number 60/166,906 filed November 22

1999 is not valid for the claims of the instant application because the specification of the

provisional application does not contain any details regarding the limitations of the

claims of the instant application. Accordingly, the reference cited below is valid.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly
> claiming the subject matter which the applicant regards as his invention.

Claims 10, 31, and 51 recite "said latency data **updates** and said service

availability and metric measurements **test updates**". There is insufficient antecedent

basis for this limitation in the claim.

Response to Arguments

Applicant's arguments filed 05/16/07 have been fully considered but they are not

persuasive.

Applicants argued that Bradley does not qualify as prior art because documents

filed in provisional patent application serial numbers 60/219,172, 60/219,166, and

60/219,177 were created before June 7, 2000, the priority date of Bradley.

Examiner disagrees. Applicant have failed to provide a § 1.131 Affidavit or

declaration of prior invention showing proof or facts to support the arguments above.

The showing of facts shall be such, in character and weight, as to establish reduction to

practice prior to the effective date of the reference, or conception of the invention prior

to the effective date of the reference coupled with due diligence from prior to said date

to a subsequent reduction to practice or to the filing of the application. Original exhibits

of drawings or records, or photocopies thereof, must accompany and form part of the

affidavit or declaration or their absence must be satisfactorily explained. Accordingly,

the rejection is maintained.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that

form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-5, 7-9, 11-19, 21-26, 28-30, 32-40, 42-50, 52-60, and 62 are rejected

under 35 U.S.C. 102(e) as being anticipated by Bradley et al. (hereinafter Bradley) US

application number 7,082,463.

As per claims 1 and 22, Bradley teaches a process and a program storage

medium readable by a computer for a determining server performance metrics in a

network (see fig 7, abstract), comprising the steps of: providing service metric probe

means resident on a server for determining the service availability and metric

measurements of types of services provided by a content delivery machine (col 5 lines 8-16); providing latency probe means resident on a server for determining the latency of various servers within said network (col. 14 lines 1-67); wherein said service metric probe means consults a configuration file containing each DNS name in its area and the set of services associated with each DNS name (fig 10; col. 10 lines 4-20; col. 17 lines 1-67); wherein said services include any of: HTTP, HTTPS, FTP, streaming media, and/or generic SNMP (col. 6 lines 44-51; col. 10 lines 4-20); and wherein said latency probe means calculates the latency from its location to a client's location (col 14 lines 1-67).

As per claims 2 and 23, Bradley teaches each server in said network has a metric test associated with each service supported by each content delivery server (fig 7; col. 5 lines 8-16).

As per claims 3 and 24, Bradley teaches a service metric probe means periodically performs metric tests on content delivery servers within said service metric probe means' area, and wherein said service metric probe means records the metric results from said periodic tests (fig 7; col. 5 lines 8-16).

As per claims 4 and 25, Bradley teaches a latency probe means calculates the round trip time (inherent in Gupta latency probe) for sending a packet to a client to obtain the latency value, and wherein the round trip time tests that said latency probe means

performs, includes any of: PING, UDP Reverse Name lookup, or UDP Packets to high

number ports (col. 14 line 60 to col. 16 line 65).

As per claims 5 and 26, Bradley teaches a latency probe means sends a UDP Packet

probe to high number ports that fail, said latency probe means resends said UDP

Packet probe with a low TTL number and increments the TTL number until failure

occurs, a last successful TTL number indicates partial latency data (col.14 line 60 to col.

16 line 65).

As per claims 7 and 28, Bradley teaches a service metric probe means sends an update

to all DNS servers in said network that consists of all tests since the last update (col.5

lines 38-56; col. 17 line 1 to col. 18 line 65).

As per claims 8 and 29, Bradley teaches a latency probe means that updates DNS

servers with the clients' latency data (col. 5 lines 38-56; col. 17 line 1 to col. 18 line 65).

As per claims 9 and 30, Bradley teaches a DNS server that uses latency data updates

from said latency probe means to determine a closest content delivery server to a client

(col. 17 line 1 to col. 18 line 65).

As per claims 11 and 32, Bradley teaches a service metric probe means that sends a

packet request to a content deliver server and receives, in response, a packet

containing various metrics of the content delivery server, and wherein said service
metric probe means combines the content delivery server's metrics to arrive at a load
metric which is sent to at least one DNS server (fig 7; col. 5 lines 38-67).

As per claims 12 and 33, Bradley teaches a process and a program storage medium
readable by a computer for a determining server performance metrics in a network (see
fig 7 and abstract), comprising the steps of: providing service metric probe means
resident on a server for determining the service availability and metric measurements of
types of services provided by a content delivery server (col. 5 lines 8-16); providing
latency probe means resident on a server for determining the latency of various servers
within said network (col. 14 lines 1-67); wherein said service metric probe means sends
an update to all DNS servers in said network that consists of all service availability and
metric measurements since the last update (fig 10; col. 10 lines 4-20; col. 17 lines 1-67);
and wherein said latency probe means updates said DNS servers with clients' latency
data (col. 5 lines 38 et seq; col. 17 line 1 to col. 18 line 65).

As per claims 13 and 34, Bradley teaches a service metric probe means that consults a
configuration file containing each DNS name in its area and the set of services
associated with each DNS name, and wherein said services include any of: HTTP,
HTTPS, FTP, streaming media, and/or generic SNMP (col. 6 lines 44-51; col. 10 lines 4-
20).

As per claims 14 and 35, Bradley teaches a latency probe means that calculates the latency from its location to a client's location (col. 10 lines 7-20).

As per claims 15 and 36, Bradley teaches each server in said network has a metric test associated with each service supported by said server (col. 5 lines 8-37).

As per claims 16 and 37, Bradley teaches a service metric probe means periodically performs metric tests on the servers within said service metric probe means' area, and wherein said service metric probe means records the metric results from said periodic tests (fig 7; col. 5 lines 8-37).

As per claims 17 and 38, Bradley teaches a latency probe means that calculates the round trip time for sending a packet to a client to obtain the latency value, and wherein the round trip time tests that said latency probe means performs, includes any of: PING, UDP Reverse Name lookup, and/or UDP Packets to high number ports (col. 27 line 17 to col. 28 line 2.

As per claims 18 and 39, Bradley teaches when latency probe means sends a UDP Packet probe to high number ports that fail, said latency probe means resends said UDP Packet probe with a low TTL number and increments the TTL until failure occurs, the last successful TTL value will indicate the partial latency data (col.14 line 60 to col. 16 line 65).

As per claims 19 and 40, Bradley teaches a DNS server that uses said latency data updates to determine closest content delivery server to a client (col.5 lines 38-56; col. 17 line 1 to col. 18 line 65).

As per claims 21 and 42, Bradley teaches a service metric probe means that sends a packet request to a content deliver server and receives, in response, a packet containing various metrics of the content delivery server, and wherein said service metric probe means combines the content delivery server's metrics to arrive at a load metric which is sent to at least one DNS server (fig 7; col. 5 lines 38-67).

Claims 43-50, 52-60 and 62 disclose an apparatus that contains the same limitations as the process and method claims discussed above. Therefore, they are rejected under the same rationale.

Allowable Subject Matter

Claims 20, 41 and 61 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Furthermore, Claims 10, 31 and 51 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the

limitations of the base claim and any intervening claims and also, by correcting the 112

issue stated above.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time

policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE

MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later

than SIX MONTHS from the mailing date of this final action.
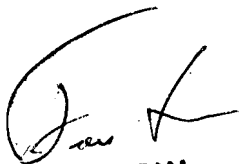

Any inquiry concerning this communication or earlier communications from the

examiner should be directed to Frantz B. Jean whose telephone number is 571-272-

3937. The examiner can normally be reached on 8:30-6:00 M-f.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's

supervisor, Zarni Maung can be reached on 571 272 3939. The fax phone number for

the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the

Patent Application Information Retrieval (PAIR) system. Status information for

published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see http://pair-direct.uspto.gov. Should

you have questions on access to the Private PAIR system, contact the Electronic

Business Center (EBC) at 866-217-9197 (toll-free).

Frantz Jean

FRANTZ B. JEAN
PRIMARY EXAMINER